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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-509

HUGO DiPAOLO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Court of Appeals of the State of New York, entered July 6, 1972 [30 N.Y. 2d 962], affirming an order of the Supreme Court of the State of New York, Appellate Division, First Department, entered October 19, 1971, reducing petitioner's sentence from four to three years, but otherwise affirming, with both majority and dissenting memoranda opinions [37 A.D. 2d 823, 325 N.Y.S. 2d 190 (1971)] a judgment of the Supreme Court, Bronx County, rendered February 5, 1971, convicting the petitioner, after

a jury trial, of the crimes of Promoting Gambling in the First Degree [New York Penal Law §225.10(2)(a)], Possession of Gambling Records in the First Degree [*id.* §225.20(2)], Promoting Gambling in the Second Degree [*id.* §225.05] and Possession of Gambling Records in the Second Degree [*id.* §225.15], and sentencing him to State Prison for concurrent indeterminate terms of up to four years on the felony counts and an unconditional discharge as to the other two counts.

Upon information and belief petitioner is presently at liberty pending the termination of this application.

Questions Presented

There are no substantial federal questions in this case.

Statement of the Case

On April 4, 1969, Detectives John Fitzpatrick and Alfred Hughes of the New York City Police Department, another detective and several patrolmen, in the course of an investigation into gambling activity, had occasion to enter premises 2465 Crotona Avenue in the Bronx (21-22).* At about 4:50 p.m., as Fitzpatrick was approaching the third floor landing of the public hallway of the building, he saw the petitioner, Hugo DiPaolo, leaving apartment 3-C. The petitioner walked in his direction, observed the officer, then threw a brown steno pad to the floor and quickly retraced his steps back into the apartment. Fitzpatrick,

* All references, unless otherwise noted, are to petitioner's printed Appendix on appeal to the Court of Appeals.

an expert in "mutuel race horse policy" gambling,* picked up the pad (People's Exh. 1; 106) and observed "various policy notations" therein (23-26). He then forced in the door of the apartment before DiPaolo could close it and, once inside, arrested the petitioner and two other men who were not prosecuted. He searched the petitioner and found a driver's license bearing DiPaolo's name and address, 2465 Crotona Avenue. After Fitzpatrick advised the petitioner of his constitutional rights, the petitioner responded to his questions and told the officer his name, age and stated that the apartment was his (27-28, 53-56, 66-70). The advisement was given in the kitchen, wherein the officer also saw in plain view on the kitchen table 30 sheets of paper containing approximately 10,000 mutuel race horse policy plays (People's Exh. 2; 81-82), a brown paper bag containing nine unmarked envelopes, six of which housed slips of paper collectively representing approximately 75,000 mutuel race horse policy plays (People's Exhs. 3-8; 83, 86-87).

While in the apartment, Detective Hughes was followed by a barking dog, who he feared was going to bite him. "Who owns the dog?" he asked. "I do" petitioner answered. "Do you live here?" Hughes asked. "Yes I do," petitioner said. Then Hughes demanded: "Call off your dog" (Trial 408).

On May 27, 1969, the Grand Jury of Bronx County filed a four-count indictment against the petitioner, charging

* Mutuel race horse policy is a form of gambling where bets are placed on either one, two or three digit numbers, *i.e.*, single action, "bolito," or straight mutuel race horse policy, the winning number being usually determined by the outcome of individual horse races at a local track.

him with Promoting Gambling in the First and Second Degrees and Possession of Gambling Records in the First and Second Degrees. No motion to suppress evidence on unconstitutional grounds was made. The petitioner was brought to trial on November 23, 1970, wherein only two witnesses, Detectives Fitzpatrick and Hughes, gave testimony. The jury found him guilty of all four counts and on February 5, 1971, he was sentenced as indicated above.

ARGUMENT

POINT ONE

Petitioner's arrest and the seizure of evidence in the public hallway and in his apartment did not violate his constitutional rights.

Petitioner contends that he was arrested as a result of an unlawful invasion of privacy which included the seizing of personal property without an arrest or search warrant coupled with an unauthorized invasion of his dwelling.

Initially, we note that petitioner failed both before and in the course of his trial to make a motion to suppress the evidence to which he now belatedly objects. Under New York law he thereby waived his right to a judicial determination of the constitutional claim raised herein [former Code Crim. Proc. §813-d(4), now, Crim. Proc. Law Art. 710; *People* v. *Britton*, 26 A.D.2d 586, 271 N.Y.S.2d 1010 (1966), *cert. den.* 386 U.S. 935 (1966); *People* v. *McCall*, 19 A.D.2d 630, 241 N.Y.S.2d 439 (1963)]. No doubt realizing this, he did not even attempt to raise the question on his appeal to the Appellate Division or to the Court of Appeals. Moreover, it should also be noted that petitioner did not move

to amend the remittitur which application would clearly have shown that the New York appellate courts did not pass on this issue. Thus, he now raises it here for the first time. As this Court stated in the case of *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969), "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions" [see, *Crowell* v. *Randall*, 10 Pet. 368, 9 L.Ed. 458 (1836); *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers' Ass'n, Inc.*, 260 U.S. 334 (1959)].

It would thus seem inappropriate on the record herein to discuss the merits of the seizure plaint. However, since petitioner has presented substantial argumentation on the claim, we nonetheless turn to its merits. In the first place, Detective Fitzpatrick's seizure of the steno pad that petitioner discarded in the public hallway outside his apartment was an indisputably proper exercise of his authority. It is settled that a police officer in the performance of his duties has a right to enter common passageways of multiple dwellings, and that evidence obtained therein without a search warrant is admissible in court [*Burks* v. *United States*, 287 F.2d 117 (9th Cir. 1961), *cert. den.* 369 U.S. 841 (1961); *United States* v. *Buchner*, 164 F.Supp. 836 (D.C. D.C. 1958), *aff'd* 268 F.2d 891 (D.C. Cir. 1958), *cert. den.* 359 U.S. 908 (1958); *People* v. *Adams*, 176 N.Y. 351 (1907); *People* v. *Garcia*, 49 Misc.2d 938, 126 N.Y.S. 2d 734 (1966)].

Secondly, under New York law, a policeman may arrest a person without a warrant if he has reasonable cause to believe that person committed a felony [Code Crim. Proc. 177(3); *People* v. *Russell*, 35 Misc. 765, 72 N.Y.S. 1 (1901), *aff'd* 67 A.D. 620, 74 N.Y.S. 1141 (1901), appeal dismissed

171 N.Y. 655, 63 N.E. 1120 (1901)]. Having perused the steno pad, which contained various policy notations, Detective Fitzpatrick, an expert qualified at trial in mutuel race horse policy, surely had such reasonable cause. Moreover, his entry into the apartment was justified on grounds of "hot pursuit" [see, *Warden* v. *Hayden*, 387 U.S. 294 (1967); *Dorman* v. *United States*, 435 F.2d 385 (D.C. Cir. 1970)].

Finally, once legally in the apartment, Detective Fitzpatrick was clearly within his rights in seizing the materials in plain view on the kitchen table. This Court stated in *Harris* v. *United States*, 390 U.S. 234, 236 (1967): "It has long been settled that objects falling in plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence" [see, also *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465 (1971)].

Thus, we respectfully submit that, aside from the fact that the issue is not properly before this Court, the record herein is barren of any evidence to support the claim.

POINT TWO

The trial court did not commit error by admitting petitioner's pedigree statement into evidence.

It will be recalled that after Detective Fitzpatrick placed petitioner under arrest in the apartment, the officer advised DiPaolo of his rights pursuant to *Miranda* v. *Arizona* [384 U.S. 436 (1966)]. Subsequent to the advisement, petitioner, in response to three questions, told Fitzpatrick his name, age and the fact that he resided in the apartment. It will be further recalled that while the officers were in his apart-

ment, Detective Hughes had occasion to ask petitioner to restrain his barking dog which animal was following the officer about the premises. In the course of that incident Detective Hughes felt constrained to ask petitioner whether he lived in the apartment. DiPaolo answered in the affirmative at which point Hughes ordered him to "call off" the dog.

Petitioner contends that his utterance to Detective Fitzpatrick relative to his tenancy in the apartment should not have been admitted into evidence despite the administration of *Miranda* warnings since the record is devoid of any facts demonstrative of a knowing waiver of the pertinent rights on his part. Seemingly, petitioner has no quarrel with the later statement uttered to Detective Hughes.

At the outset, we note that although petitioner was given pre-trial notice of the prosecution's intention to utilize his statement to Fitzpatrick against him at trial, he did not request a pre-trial hearing to have a judicial determination of the issues attendant to the *Miranda* decision [see, former Code of Crim. Proc., §813-f, now Crim. Proc. Law Art. 710; see also *Jackson* v. *Denno*, 378 U.S. 368 (1964); *People* v. *Huntley*, 15 N.Y.2d 72, 225 N.Y.S.2d 838 (1965)]. We suggest then that petitioner waived his right to a judicial determination of the *Miranda* plaint raised herein. However, it should be noted that the petitioner was accorded a hearing during the trial to judicially determine whether he had been advised of his rights; and, eventually the voluntariness of the pertinent statement was submitted to the jury. Interestingly enough petitioner's only objection to the reception of the statement into the evidence was to the clarity and precision of the advisements (121-122) and

not to the wholly distinct issue—one of waiver—raised in the New York appellate courts and now before this Court. Thus, we have all along contended and we adhere to that position that DiPaolo failed to preserve for appeal the claim of an unknowing and unintelligible waiver of his constitutional rights [see, *People* v. *Vidal*, 26 N.Y.2d 249, 254, 309 N.Y.S.2d 336 (1970); *People* v. *Murphy*, 135 N.Y. 450, 455 (1892); *Richardson on Evidence*, §543 (Prince, 9th Ed. 1964)].

Turning to the merits of the *Miranda* plaint, we consider it significant that petitioner's statement was in answer to a question regarding pedigree. In *Farley* v. *United States*, 381 F.2d 357 (5th Cir. 1967), *cert. den.* 389 U.S. 942 (1967), it was held that *Miranda* should not be so strictly construed as to exclude the answers to such questions, since the information is otherwise so readily obtainable [see, also, *People* v. *Ryff*, 27 N.Y.2d 707, 314 N.Y.S.2d 17 (1971); *People* v. *Rivera*, 26 N.Y.2d 304, 310 N.Y.S.2d 287 (1970)].

In any event, petitioner who had had an extensive criminal involvement with the law—this fact is *dehors* the trial record (312-313), answered the question while in his own apartment and in the company of two friends. Since there is no indication in the trial transcript that he did not understand the *Miranda* warnings—indeed, had counsel voiced the proper objection, a record on this issue would have been generated—the statement was knowingly and intelligently made.

Finally, we submit that it was not in any case necessary for the People to show that petitioner owned the apartment in order to prove that he possessed the gam-

bling records therein. At trial the People established that the steno pad discarded by petitioner in the public hallway outside the apartment was the master record for the collectors' slips found in the apartment. The nexus between the exhibits was further confirmed by the fact that the steno pad contained the envelopes in which the collectors' slips for the day of the arrest would have been deposited. Thus, the exhibits themselves, at the least, created the reasonable inference that petitioner possessed them within the meaning of the statute at the time of the arrest. In addition to this evidence, the People showed that the banker of a policy operation would have to have exclusive possession of all the records (157-168), and that defendant was arrested in the "policy bank." Therefore, there was more than sufficient evidence, without petitioner's pedigree statement, to show that he possessed the gambling records found in his apartment.

Furthermore, petitioner's later statement to Detective Hughes (when his dog was barking at the officer) that the apartment belonged to him was free of whatever taint may have attached to the earlier pedigree statement.

POINT THREE

The statements of the prosecutor did not deprive petitioner of a fair trial.

During the course of the People's summation, the assistant district attorney made the following comments:

> "Now gentlemen, I am not going to come here and moralize to you about the evils of gambling. But I think that you people now have had an experience and

exposure and a little more knowledge than you did when you first took your respective seats in this jury box. The opportunity of hearing from experts, experienced detectives, exactly what numbers race horse police is. Its scope. What it involves. And what does it involve?

"It involves little people, everyday people, humble people. Dimes and quarters, with the hope that they will hit the winning number. And those are the people, often poor people, apparently who are being bilked in a police operation, because the chances, the better's chances are a thousand-to-one of winning. What does he get in return? Five hundred. Five hundred. Fifty-to-one. What happens he is the gambler. For his money down. The odds are against him but he is gambling.

"Mr. Williams is no gambler. He is a business man. The police game is a business. The odds are all in his favor. He wins everyday.

"What is the effect of this? These individuals are being bilked for those nickels and dimes and quarters everyday that this thing runs. And all that money coming in from these individuals is money coming from the most disadvantaged neighborhood in New York, Bronx County. And where is all the money going. It's going to schools. It's going to schools. It's going for hospitals. It's going for more and

"Mr. Carozza: Judge, I must object because I don't know whether that's fair comment.

"The Court: Overruled.

"Mr. Carozza: Exception.

"Mr. Wolf: It is going to give relief to the people that need it the most. It's going into the pockets of all the children in Bronx County. That's where it's going.

[illegible]

er's bank. Within this evidentiary framework, the aforesaid utterances of the prosecutor cannot, we submit, be fairly deemed to have connected petitioner to a wider criminal network.

With respect to petitioner's complaint relating to the prosecutor's remarks about the effects of the policy operation on the poor and their community, we simply note that the evidence supported these comments. Thus the jury had already been informed of the massive odds against a player in the policy scheme (263-265). Similarly it had been told that the payoff on a winning number was far less than the odds of hitting the number (*id.*). In truth, then, the player in petitioner's illicit game was, in the language of the prosecutor, being "bilked." Moreover, it is common knowledge, and, therefore, should have come as no surprise to the veniremen, that the patrons of policy games are usually the poor who of necessity must live in disadvantaged communities [see, *e.g.*, *People* v. *Gillson*, 109 N.Y. 389 (1888)]. Indeed, the prosecutor was merely reminding the jury that the Legislature had a legitimate end in mind when it proscribed petitioner's conduct, and the relevant statements should be considered a rational effort on the part of the prosecutor to place the so-called "victimless" crimes of gambling in their true perspective, so as to guard against the possibility that the jury might substitute its own wisdom for that of the Legislature.

Petitioner also contends that the prosecutor's comment regarding the yearly gross business of the policy operation exceeded the scope of the indictment. We agree with the trial court that the pertinent evidence was admissible on

the basis of defense counsel's cross-examination of Detective Hughes. Hughes was asked to form an opinion as to the period encompassed in the mutuel race horse policy exhibits—a week—and the amount of money they represented—over $500 a day (108-109). Beyond that, the nature of the crimes charged implied an ongoing form of illicit activity and the jury itself could readily have estimated the yearly scope of the scheme since it had already been apprised of its daily intake. The felony possession count of the indictment recited all of the week's work seized in the apartment (6). Furthermore, the evidence was relevant to the question of motive [see, *People* v. *Fitzgerald*, 156 N.Y. 253, 259 (1898); *People* v. *Scott*, 153 N.Y. 40 (1897)].

As for the prosecutor's remark that no taxes are paid on the income of the policy scheme, surely this was nothing more than to state the obvious—gamblers do not declare their illegal earnings for tax purposes—and was not in the least prejudicial to the petitioner.

In closing we note that any prejudice that might have flowed from the prosecutor's comments was cured by appropriate jury instructions which were acceptable to petitioner (Proceedings 422, 424, 457; Charge 468). Indeed, New York's appellate courts have already ruled that these statements in the context of all the evidence did not deprive petitioner of a fair trial. Parenthetically it should be noted that the tribunals of that state are particularly sensitive to claims involving prosecutorial misconduct [see, *People* v. *DiPaolo*, 37 A.D.2d 823 (1971), *aff'd* 30 N.Y.2d 962 (1972)]. Therefore, we respectfully submit that any error committed was harmless in light of the overwhelm-

ing proof of petitioner's guilt [*Chapman* v. *California*, 386 U.S. 18 (1967); *People* v. *Schwartzman*, 24 N.Y.2d 241, 251, 299 N.Y.S.2d 817 (1969); Code of Crim. Proc. 542, now Crim. Proc. Law §470.05(1)].

POINT FOUR

The charge was free of reversible error.

After the trial court instructed the jury on the applicable principles of law and marshaled the evidence, the jury twice returned from its deliberations unable to reach a verdict, and a third attempt at deliberation was interrupted for a dinner recess. Before the jury was permitted to leave the courtroom, the judge made the following statement:

> "Sit down. Now gentlemen, we are going to come back here at 8:30 and we are going to continue working. And I'm going to tell you very frankly, this is the simplest case I've ever tried since I've been sitting in the Supreme Court. Either you believe Hughes and Fitzpatrick and believe that the People have proven their case beyond areasonable doubt or you don't believe it. It's just that simple. It's a two day trial. There haven't been a lot of witnesses here. There is not a lot of involved exhibits. It's a very simple case, one way or the other, depending upon whether or not you believe the People have proved their case.
>
> Now if the People have proven their case beyond a rasonable doubt, you have a right to bring in a verdict against this defendant. If the People have not proven their case beyond areasonable doubt, and you do not believe Hughes of Fitzpatrick, then you have a duty to acquit this defendant.

So we are going to do to dinner, come back and we are going to continue working. All right, you are excused for dinner.

Do not discuss the case among yourselves during the recess and do not form any opinion during the time you are out for dinner" (299-300).

After dinner the jury resumed its deliberations. Thirty-five minutes later, at the request of the foreman, the court repeated its instructions on the law for the first and third counts of the indictment (301). Thereafter the jury reached its verdict.

Petitioner claims that the court committed reversible error with respect to the jury instruction quoted above. He argues that the cahrge over-simplified the law on reasonable doubt and, in effect, removed several issues from the province of the jury.

Initially, we note that petitioner did not take exception to the charge, nor did he make a request for instructions. This failure precluded him from raising the objection on appeal to the Court of Appeals [Code Crim. Proc. §420-a; *People* v. *Reynolds*, 25 N.Y.2d 489, 307 N.Y.S.2d 201 (1969); *People* v. *Baker*, 23 N.Y.2d 307, 296 N.Y.S.2d 475 (1968); *People* v. *Simons*, 22 N.Y.2d 533, 293 N.Y.S.2d 521 (1968); *People* v. *Regina*, 19 N.Y.2d 65, 277 N.Y.S.2d 683 (1966); *People* v. *Cohen*, 5 N.Y.2d 282, 184 N.Y.S.2d 340 (1959)]. It has been held by this Court on numerous occasions that a litigant must follow state procedures in raising a federal question and that, when required by state practice, the federal question must be raised before the trial court [*Williams* v. *Georgia*, 349 U.S. 375 (1950); *Brown* v. *Massachusetts*, 144 U.S. 573 (1891)]. If reasonable state procedural

requirements are not observed, as in the instant case, the court will decline to exercise jurisdiction [*Ferguson* v. *Georgia*, 365 U.S. 570 (1960); *In re Lamkin*, 355 U.S. 59 (1957)].

The trial court previously gave the jury a thorough and lucid charge on the question of reasonable doubt. In addition, the learned judge carefully outlined the factual elements required to be proved for each of the crimes and marshaled the evidence (250-284). The statement to which petitioner objects served only to remind the jury that its duty was to determine whether or not the People met their burden and nothing more. Since the People's case rested in large part on the credibility of the two detectives—witness defense counsel's summation—defendant should not be heard to complain about a charge that emphasized that issue. As to the learned judge's personal view of the case —"This is the simplest case I've ever tried since I've been sitting in the Supreme Court"—we note that he did not express any opinion as to the guilt or innocence of the defendant. Moreover, we consider it significant that the jury, after the judge's statement, did not hasten to a verdict, but in fact made a request for further specific instructions.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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